86-715

No. ———

IN THE

Supreme Court of the United States

October Term, 1986

IN RE FLIGHT TRANSPORTATION CORPORATION SECURITIES LITIGATION

SUBCLASS IV (Unitholders),

Petitioner,

v.

FOX AND COMPANY, REAVIS & McGRATH, et al,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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1986—Northwest Printing Co., 3010 2nd St. No., Minneapolis, MN 55411—588-7506

76 pp

QUESTIONS PRESENTED

1. Whether in the context of approving class action settlements, the district court ignored the holding in Phillips Petroleum Co. v. Shutts, 472 U.S. ___, 105 S.Ct. 2965, ___, 86 L.Ed.2d 628, 641 (1985) and denied due process of law by imposing financial obligations upon objecting, absent plaintiff class members who have never been served with process and who are without prior notice of the possibility that such obligations might be imposed.

2. Whether by requiring a subclass to accept settlements or to renounce previously approved settlements with other defendants and go to trial against all defendants, the district court coerced a subclass to accept settlements in direct conflict with Evans v. Jeff D., ___ U.S. ___, 106 S.Ct. 1531, L.Ed.2d 747 (1986), petition for rehearing denied, ___ U.S. ___, 106 S.Ct. 2909, 90 L.Ed.2d 995 (1986) and United States v. Swift, 286 U.S. 106, 114-115 (1932).

STATEMENT REQUIRED BY RULE 21(b)

The proceedings in the court below involved the claims of petitioner-appellant Subclass IV (Unitholders) by and through its certified representatives Putnam High Yield Trust, United High Income Fund, Inc., and Oppenheimer High Yield Fund and respondents-appellees Thomas C. Bartsh, Receiver, Fox and Company, Opperman & Paquin and its partners, James F. McGovern, Reavis & McGrath, Norwest Bank Mpls., N.A., Norwest Calhoun-Isles, N.A., American Home Assurance Company, Alexander & Alexander Services, Inc., Alexander & Alexander, Inc., St. Paul Fire & Marine Insurance Co., Ezell Jones, Marjorie Terhaar, Russell T. Lund, Jr., Wardell M. Montgomery, Delbert Oldenburg, Larry Walston, and the following representative plaintiffs of Subclasses I, II, III, and V: Frank P. Antinore, Sid Bader, Dennis Barr, Caroline J. Bender, Barry Bernstein, Dolores and Robert Bezark, James P. Christopher, Sylvester E. Daily, Jr., Ethel Dimicele, James J. Donohue, Ron Fingerhut, Kristi A. Fogarty, Robert L. Gold, Andrew Goodman, Emil Gotschlich, Theodore Herman, Joyce Hill, Ronald Knuth, Dennis A. Koltun, Stanley F. Koutek, Milt Krelitz, Carmen and Eugene Kreuzkemper, Grant Lovelle, James Lovelle, Joseph Mangano, Donald Miller, Phyllis Miller, Gordon Moscoe, Dennis Rease, Phil Richter, Maureen Schleiffer, Richard Schwartzchild, Ann Seaver, Bruce Shankman, Ellyn and Robert Stein, Marvin Steinberg, James Walsh, and Allan Ziskin.

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IN THE
SUPREME COURT OF THE UNITED STATES
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IN RE FLIGHT TRANSPORTATION CORPORATION SECURITIES LITIGATION.

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Petitioner,

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Subclass IV (Unitholders) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The Eighth Circuit's opinion is reported at 794 F.2d 318 and is set forth in Appendix A. The Eighth Circuit's denial of rehearing en banc is not reported and is set forth in Appendix B. The district court's memorandum opinion and orders are not reported and are set forth in Appendices C, D, E and F.

JURISDICTION

On June 11, 1986, the Eighth Circuit filed its opinion. On July 31, 1986, the Eighth Circuit denied Subclass IV's petition for rehearing and suggestion of rehearing en banc. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

THE CONSTITUTIONAL PROVISIONS AND RULES OF CIVIL PROCEDURE INVOLVED

The due process clause of the United States Constitution and Rule 23(c) (d) and (e) of the Federal Rules of Civil Procedure are set forth in Appendix G.

STATEMENT

Background information regarding the Flight Transportation Corporation ("FTC") securities litigation stemming from June, 1982 securities offerings is set forth in a previous opinion of the United States Court of Appeals for the Eighth Circuit, In Re Flight Transportation Corp. Securities Litigation, 730 F.2d 1128 (8th Cir. 1984) cert denied 105 S.Ct. 1169 (1985). There, the court of appeals affirmed, with some modification, the district court's approval of the "Sharing Agreement" which settled disputes among claimants to more than $22,000,000 of escrowed proceeds of the securities offerings and provided for the joint prosecution of all further claims.

On May 31, 1983, a notice of class action determination was sent to putative class members informing them in general of the litigation, describing the class and subclasses involved and explaining what a class action is and how to remain a member as well as how to be excluded from the class. The class action notice is set forth in Appendix H. Significantly, the notice stated that: "Remaining a class member will not subject you to any out-of-pocket costs or fees and will enable you to participate in the recoveries obtained pursuant to the Sharing Agreement...." Any member wanting to be excluded from the class had until July 12, 1983 to do so. Finally, the notice described the terms of the Sharing Agreement, including the proposed

resolution of the constructive trust claim to approximately $22,000,000.

The notice made no reference, direct or indirect, to the possibility of class members having any financial obligations imposed upon them should they elect to remain in the class. In July, 1983, the district court certified a class of all purchases of FTC securities between 1979 and 1982 who suffered a loss as a result, with the exception of defendants. The court established five subclasses consisting of four groups of stockholders and Subclass IV, the Unit purchasers which are, in large part, mutual funds, common trust funds of banks and other large financial institutions.

Three years after the certification of the class and court approval of the Sharing Agreement, settlement agreements were reached with Fox & Company ("Fox"), FTC's auditors, and with Reavis & McGrath ("Reavis"), legal counsel to certain underwriters for FTC's public offerings. Contrary to the Sharing Agreement and unlike earlier settlements, the Fox and Reavis settlements contain indemnity provisions which impose affirmative indemnity and legal defense obligations on all claimants under the Sharing Agreement. Subclass IV refused to agree to these settlements because of these provisions.

The Fox Settlement contains an unrestricted indemnity covering all current and potential claims related

either to the securities offering or services provided by Fox. This indemnity covers claims against Fox by any person whether or not such a person is a party to the Sharing Agreement and is enforceable against any settling claimant without any dollar limitation. The agreement contains a broad legal defense provision requiring each of the settling claimants to provide a legal defense for Fox.

The Reavis Settlement provides an indemnity against any judgment obtained against Reavis by any person, whether or not the person is subject to the Sharing Agreement, subject to the limitation that the indemnity will not exceed the amount of $1,600,000 paid in settlement by Reavis. The indemnity permits the

obligation to be fulfilled by judgment reduction but does not prevent direct enforcement of the indemnity obligation against one or more settling claimants.

On September 13, 1985, the district court heard objections to the proposed settlements. Subclass IV objected to the settlements on several grounds including the imposition of financial obligations on Subclass members. In its October 17, 1985 memorandum opinion, the district court imposed these settlements on Subclass IV unless it promptly elected to proceed to trial, renounce all its claims under the Sharing Agreement, and return over $11,000,000 previously distributed to its members.

The Court of Appeals Proceeding

On June 11, 1986, the Eighth Circuit affirmed the judgment of the district court. First, the court of appeals ruled that the trial court's finding that the risk to which the indemnity provisions exposed Subclass IV was tolerable and not clearly erroneous. Next, the appellate court ruled that the district court did not abuse its discretion by in imposing the indemnity provisions on Subclass IV. Finally, the court of appeals ruled that the district court did not force Subclass IV to accept the settlement as it gave Subclass IV the option of going to trial provided it renounced all of its claims of the Sharing Agreement and returned the approximately $11,000,000

distributed to it pursuant to the Sharing Agreement.

Subclass IV petitioned the Eighth Circuit for rehearing en banc on June 25, 1986. The court of appeals denied Subclass IV's petition on July 31, 1986.

REASONS FOR GRANTING THE WRIT

I. THE EIGHTH CIRCUIT'S DECISION IMPOSES FINANCIAL OBLIGATIONS ON CLASS MEMBERS IN VIOLATION OF DUE PROCESS OF LAW AND DECISIONS OF THIS COURT.

This petition raises important questions of federal civil procedure in approving class action settlements. The Eighth Circuit opinion does not address but implicitly rules on a due process of

law issue of critical public importance: Whether a district court has authority to impose affirmative financial obligations on absent plaintiff class members who were never served with process and who are included in the class without prior notice that such obligations could possibly be imposed upon them.

The May, 1983 notice of class action determination gave persons making the decision to remain in or to opt out of the class absolutely no suggestion - remote or otherwise - that they could be subject to any financial obligations. Indeed, it assured them that they would not even be subject to out-of-pocket costs or fees. Now, over three years after the opt out period has expired, class members -

burdened with the Fox and Reavis indemnities imposed upon them by judicial fiat - face financial obligations without ever being served with summons or any other effective form of warning.

This Court has recently held that due process of law strictly circumscribes the burdens which may be placed on absent plaintiff class members and limited the authority of a state court to disposing of the class members underlying claims. In Phillips Petroleum Co. v. Shutts, ___ U.S. ___, 105 S.Ct. 2965, ____, 86 L.Ed.2d 624, 641 (1985), this Court declared:

> Besides this continuing solicitude for their rights, absent plaintiff class members are not subject to other burdens imposed upon defendants. They need not hire counsel or appear. They are almost never subject to counterclaims or cross-claims, or liability for fees and costs. Absent

> plaintiff class members are not subject to coercive or punitive remedies. Nor will an adverse judgment typically bind an absent plaintiff for any damages, although a valid, adverse judgment may extinguish any of the plaintiff's claim which was litigated.

Neither the district court nor the appellate court cited any authority granting a federal court power to impose financial obligations upon absent plaintiff class members who participated in the class action without prior notice that a court might impose liabilities having no relationship to the member's claims. The district court's order involuntarily makes each class member the insurer of Fox and Reavis for the consequences of their wrongdoings. None of the class members were notified at the

time of certification that they were to be insurers of any risks - remote or otherwise - and the district court's October 17, 1985 order does not specify any limit for a class member's exposure.

In addition to constitutional due process issues, the Eighth Circuit's ruling raises a question of exceptional public importance in that it will have a substantial adverse impact upon the utility of the class action device and, therefore, is a question likely to recur in the future. If this opinion stands, notices in all future class actions - unlike the one sent here - will have to disclose clearly to potential class members that if they do not opt out they may be placing their own assets in

jeopardy because a court may order them to be unlimited insurers of defendants' risks. Few potential class members will knowingly remain in the class and subject themselves to an involuntary imposition of potentially unlimited financial exposure.

This Court should grant certiorari to address these important and recurring issues.[1/] Unless reviewed and reversed by this Court, the opinion of the Eighth Circuit will critically impair Rule 23

1/ The opinion of the Eighth Circuit also conflicts with the decision of the United States Court of Appeals for the Seventh Circuit in In re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106 (1979), cert. denied, 444 U.S. 870 (1980) (federal district court cannot force class to settle state law claims not pending in the federal action).

actions and seriously erode the opportunities of individuals with small claims to obtain justice.

II. THE LOWER COURTS' COERCIVE IMPOSITION OF THESE SETTLEMENTS CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT AND SANCTIONS SUCH A DEPARTURE FROM THE ACCEPTED JUDICIAL PROCEEDINGS AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The appellate court held that the district court did not abuse its discretion or unlawfully coerce Subclass IV into accepting the Fox and Reavis settlements because it gave Subclass IV the alternative of renouncing all its claims under the Sharing Agreement, returning over $11,000,000 previously distributed Subclass IV members out of the

proceeds of earlier settlements and proceeding to a trial against Fox and Reavis and, presumably, all other defendants.

The district court's novel attempt, approved by the court of appeals, to circumvent the prohibition against court dictated settlements conflicts with at least two decisions of this Court and requires review.

A. The appellate court decision conflicts with Evans v. Jeff D., ___ U.S. ___, 106 S.Ct. 1531, ____, 89 L.Ed.2d 747, 757 (1986) petition for rehearing denied, ___ U.S. ___, 106 S.Ct. 2909, 90 L.Ed.2d 995 (1986) (April 22, 1986). In Jeff D., this Court ruled:

> "Rule 23(e) wisely requires court approval of the terms of any settlement of a class action, but the power to approve or reject a settlement negotiated by the parties before trial does not authorize the court to require the parties to accept a settlement to which they have not agreed. . . . Rule 23(e) does not give the court the power, in advance of trial, to modify a proposed consent decree and order its acceptance over either party's objection. . . . The District Court could not enforce the settlement on the merits and award attorney's fees anymore than it could, in a situation in which the attorney had negotiated a large fee at the expense of the plaintiff class, preserve the fee award and order greater relief on the merits."

Here, the district court imposed such onerous and coercive conditions on the right of Subclass IV to proceed to trial that it effectively and improperly denied Subclass IV any alternative to a court imposition of these two settlements.

While the district court did offer a conditional trial option, it is clear that the option was not a viable one and does not overcome this Court's prohibition against coercive court imposed class settlements. For example, one of the conditions required the return of funds which were created by the settlement of constructive trust claims to more than $22,000,000. Of the proceeds subject to the constructive trust claim, more than $11,000,000 has been distributed to members of Subclass IV. The remainder is held by the Receiver in trust for the Participating Creditors, for the members of the other Subclasses, and for the expenses of prosecution of the litigation. Neither of the lower courts indicated whether such funds would be subject to the constructive

trust claim of Subclass IV or even if Subclass IV's constructive trust claim was "resurrected" by the Court's Order.

Among the many other unresolved complexities presented by the "trial option" was the requirement that Subclass IV breach earlier settlement agreements and proceed to trial against the earlier settling defendants.[2/] Could Subclass

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2/ Other unaddressed complexities include: Would the earlier settling defendants be forced to defend at the trial? Could Subclass IV now assert a bankruptcy claim? What would happen to the funds returned by Subclass IV? Would the forced renunciation create an action for breach of contract by the other parties? Would Subclass IV still be subject to obligations under the Sharing Agreement? How could a Subclass IV member, such as a bank common trust with constantly changing beneficiaries, return already distributed proceeds?

IV exercise the option to go to trial without, for example, obtaining consent to withdraw from settlement agreements with earlier settling defendants? Thus, the trial option offered by the district court was wholly ephemeral. It constituted an arbitrary decree forcing the Fox and Reavis settlements upon Subclass IV even though not a single Subclass IV member agreed to them.

B. The Eighth Circuit's decision also conflicts with this Court's ruling in United States v. Swift, 286 U.S. 106 (1932). There this Court announced that in order for federal court to modify or revoke a previously approved settlement there must be a showing that one of the parties is:

> "suffering hardship so extreme and unexpected as to justify us in saying that they are victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned." Id. at 119.

Both the court of appeals and the district court found the Fox and Reavis settlements to be interdependent with earlier settlements which had been finally approved pursuant to Rule 23(e). Without any showing or finding of harm caused by new and unforeseen circumstances mandating a modification of the Sharing Agreement and other earlier settlements, the district court's "trial option" - even if viable - required revocation of all of the earlier settlements as they pertained to Subclass IV.

There is no suggestion or finding that the Sharing Agreement or the earlier settlements have operated in any manner other than as intended by the parties. The district court made no findings whatsoever to support the revocation of the earlier approved settlements. To force Subclass IV to renouce previously approved settlements without any proof that they had become "instruments of wrong" was an abuse of the district court's discretion, approved by the Eighth Circuit, and was contrary to the Swift holding. This warrants review and reversal by this Court.

CONCLUSION

For the reasons set forth above, Subclass IV (Unitholders) respectfully urge that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 29, 1986

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 85-5425, 86-5012

In re Flight Transporation Corporation
Securities Litigation

Subclasses I, II, III (Shareholders),

Appellees,

Subclass IV (Unitholders),

Appellant,

Subclass V, and Thomas C. Bartsch, receiver,

Appellees.

v.

Fox and Company, Opperman & Pacquin, James F. McGovern, American Home Assurance Company, Reavis & McGrath, a Partnership, Norwest Bank Minneapolis, N.A., Norwest Bank Calhoun-Isles, N.A., St. Paul Fire & Marine Insurance Co., Alexander & Alexander Services, Inc., Alexander & Alexander, Inc., Evanston Insurance Company, Exell Jones, Marjorie Terhaar, Russell T. Lund, Jr., Wardell M. Montgomery, Delbert Oldenburg, and Larry Walston,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA.

Submitted: May 14, 1986
Filed: June 11, 1986

Before ARNOLD, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and FAGG, Circuit Judge

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ARNOLD, Circuit Judge.

This is an appeal from orders of the District Court[1] approving a series of settlements made in the Flight Transporation Corporation class-action securities litigation. We hold that the District Court did not abuse its discretion, that it committed no error of law, and that its findings of fact are not clearly erroneous. We therefore affirm.

The background facts are given in our previous opinion, *In re Flight Transporation Corp. Securities Litigation*, 730 F.2d 1128 (8th Cir. 1984), *cert. denied*, 105 S. Ct. 1169 (1985). There, we affirmed with some modifications an order of the District Court approving the "Sharing Agreement," a document which provides for the distribution of money among the creditors and securities holders of Flight Transportation Corporation (FTC), which is in bankruptcy. FTC's securities holders were certified as a class, and this class was divided into five subclasses. Subclass IV, members of which are appellants before us in the present appeal, consisted of purchasers of FTC units, including debentures and stock warrants, under a registration statement dated June 4, 1982. We shall refer to this subclass as Unitholders.

After approval of the Sharing Agreement as modified, the FTC-related litigation proceeded in the District Court. The focus of the litigation, as our previous opinion ex-

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[1]The Hon. Charles R. Weiner, United States District Judge for the Eastern District of Pennsylvania, sitting by designation as a United States District Judge for the District of Minnesota.

plains, is a charge of fraud or culpable negligence against FTC and others in connection with certain of FTC's securities issues. Vigorous efforts were made to settle remaining claims against groups of defendants. Before us in the present case are proposed settlement agreements between the plaintiffs and five defendants or groups of defendants: (1) Alexander & Alexander, Inc., Alexander & Alexander Services, Inc. (FTC's aircraft insurance carrier), Evanston Insurance Company (FTC's directors' and officers' insurance carrier), and FTC's outside directors; (2) Opperman & Paquin (FTC's outside counsel), American Home Assurance Company (Opperman & Paquin's insurance carrier), and related parties; (3) Norwest Bank Minneapolis, N.A., FTC's primary lender, an affiliate of Norwest Bank, and St. Paul Fire & Marine Insurance Company; (4) Fox & Co. (FTC's auditor) and related parties; and (5) Reavis & McGrath (legal counsel to certain underwriters for FTC public offerings).

Subclass IV, the appellant Unitholders, object to the District Court's order approving these settlements primarily because of a provision obligating the plaintiffs to indemnify and hold harmless the settling defendants against any judgments that may be obtained against them arising out of matters which formed the basis of this litigation. We do not agree that the inclusion of this provision in the settlement agreements in question required the District Court to disapprove them.

In the first place, only two of the settlement agreements, those with Fox & Co. and Reavis & McGrath, contain true indemnity provisions. The other agreements include only a "judgment reduction" provision. In such a provision, a settling plaintiff agrees, in order to settle an action with

defendant A, that any later judgment obtained against defendant B will be automatically reduced by any amount which B recovers over against A by cross-claim or separate action for contribution or indemnity. To this sort of judgment-reduction provision Subclass IV does not seem really to object. Its concern, instead, may be that the District Court's opinion approving the settlements, *In re Flight Transporation Corp. Securities Litigation,* Master Docket No. 4-82-874 (D. Minn. October 17, 1985), seems to treat all of the settlement agreements as containing an indemnity provision properly so-called, that is, a provision which would require a settling plaintiff to indemnify a settling defendant for any recoveries secured against that defendant arising out of the underlying controversy, whether or not the amount of those recoveries exceeded the amount paid by the settling defendant to the settling plaintiff in order to obtain the settlement agreement, or the amount that the settling plaintiff may recover from someone else who in turns recovers over against the settling defendant. To the extent that this is Subclass IV's fear, we can allay it. Except for the Fox & Co. and Reavis & McGrath agreements, we construe the settlement agreements not to contain this kind of indemnity properly so-called, but, rather, to be limited to a simple judgment-recovery mechanism. Such a limited obligation Unitholders seem to concede was within the discretion of the District Court. Appellees class plaintiffs and FTC's receiver agree with this limiting interpretation. Brief of Appellees Class Plaintiffs and the Receiver 5 n. 4.

As to the agreements with Fox & Co. and Reavis & McGrath, which do go beyond a simple judgment-recovery mechanism,[2] the District Court found as follows:

> The Court recognizes the concern that counsel for subclass IV . . . have for the provisions of the settlements which require the plaintiffs to defend and indemnify the defendants for all claims related to matters which formed the basis of the FTC litigation. But while one can conceivably spin out scenarios which would require these provisions to be invoked (the objectors have not done so), the possibility of such scenarios reaching fruition is remote. This litigation has been in progress for well over three years and has been the subject of much public attention. Thus, there is little likelihood that new claims will be asserted. More importantly, however, the proposed settlements, as previously mentioned, call for the defendants to assign to the plaintiffs all claims, cross-claims, etc. that are asserted or may be asserted by the defendants. The claims that will be assigned to the plaintiffs represent a significant portion of the universe of all claims which could be brought against the defendants. This provides real and substantial protection to the plaintiff class members against the possibility of the indemnification provisions being invoked.

Slip op. 7-8. This finding that the risk to which the indemnity provisions expose Subclass IV (and, of that matter, all other members of the plaintiff class) is tolerable, is not clearly erroneous, and we therefore accept it.

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[2]We note, however, that the indemnity obligation contained in the Reavis settlement is more limited than that contained in the Fox settlement. The Reavis indemnity is limited to the $1.6 million it is paying for the settlement.

Subclass IV objects that the risk which it is being required to assume must be worth something, else settling defendants would not have insisted on the inclusion of this provision in the settlement agreements. Appellants further assert that the settlement agreements confer no benefit whatsoever on them, because they have already received, as a result of the Sharing Agreement and related negotiations, almost all of their claims. No additional cash payments, they say, will be forthcoming for them as a result of the settlement agreements. Accordingly, they characterize the agreements as requiring Subclass IV to give up something of value, the indemnification provisions, while receiving nothing whatever in return. This, they say, cannot be fair.

We disagree with this characterization of the lawsuit. The present settlement agreements may not be considered in isolation. They are merely the latest chapter, perhaps the last, in a complex series of suits and negotiations. The Sharing Agreement contemplated further recoveries, whether by judgment or by settlement, and it is not unfair for later settlement agreements adding to the funds created by the Sharing Agreements to take into account previous payments to various members of the plaintiff class, including Subclass IV. The District Court was persuaded that the benefits to Subclass IV were sufficient to justify as fair and reasonable the imposition on that Subclass (and, we again add, on all other members of the plaintiff class) of the risk posed by the indemnity provisions. We cannot say that this decision was an abuse of discretion.

Unitholders argue also that the settlement agreements now before us were concluded in violation of the Sharing Agreement itself, because counsel for Unitholders were not

permitted, they say, to participate in the negotiations leading up to these agreements. The Sharing Agreement, appellants argue, provides that no settlements may be submitted to the District Court for approval without the consent of at least three of the four claimant groups, these groups being Subclass IV, the other class plaintiffs, the receiver, and the creditors. According to appellants, only two of these groups, the other class plaintiffs and the receiver, consented to the submission of these proposed settlements to the District Court. Appellees reply that it does not matter what the course of negotiations was, or whether a procedural provision of the Sharing Agreement was violated in the submission of these proposed settlements, so long as the District Court, after a full and fair hearing at which all objections to the settlement agreements were heard, found that they were fair, reasonable, and adequate. We need not reach the legal merits of this dispute, because now, as a practical matter, we know that three out of four of the relevant groups have approved the settlements. The participating creditors have not appealed the order of the District Court, and therefore must be taken, at least *de facto*, to be in agreement with the settlements approved by that court.[3]

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[3]In support of their claim that Subclass IV was excluded from settlement negotiations and did not consent to the submission of the proposed settlement agreements to the District Court, appellants have submitted a proposed supplemental appendix, together with a motion for leave to file it. This motion is opposed by appellees. The motion for leave to file the supplemental appendix is granted, but, for reasons stated in text, we cannot agree that the matters contained therein, even if all true, require reversal of the District Court's orders. The extent to which counsel for a subclass participated in negotiations leading up to the settlement agreement is certainly a relevant factor to be considered by the District Court in deciding whether the settlement is fair and adequate, but it is not a *sine qua non*, so long as the District Court considered and ruled on all objections voiced by counsel for the objecting subclass, which it clearly did here.

Subclass IV also claims that it is unlawful of the District Court to force it to accept a settlement. Citing Fed. R. Civ. P. 23(c)(4), it points out that a subclass must be treated as a separate class for present purposes, a proposition that appellees do not contest. A class, appellants argue, cannot be required to accept a settlement to which it has not agreed. In this connection, shortly before the argument, appellants called our attention to the following language in *Evans v. Jeff D.*, 54 U.S.L. Week 4359, 4362 (U.S. April 22, 1986):

> Rule 23(e) wisely requires court approval of the terms of any settlement of a class action, but the power to approve or reject a settlement negotiated by the parties before trial does not authorize the court to require the parties to accept a settlement to which they have not agreed. . . . Rule 23(e) does not give the court the power, in advance of trial, to modify a proposed consent decree and order its acceptance over either party's objection. The options available to the District Court were . . .: it could have accepted the proposed settlements; it could have rejected the proposal and postponed the trial to see if a different settlement could be achieved; or it could have decided to try the case.

We see no violation of these principles in the action taken by the District Court here. Its opinion gave Subclass IV the option of going to trial. "The court takes this opportunity to inform the objecting parties that they may proceed to trial on their claims . . . ." *In re Flight Transportation Corp. Securities Litigation, supra,* slip op. 8. Subclass IV

complains that no real option was given it, because the District Court also said that the parties could not both proceed to trial and retain the benefits that they had derived from the Sharing Agreement. "Any trial of this matter will be conditional upon the renunciation by the parties desiring a trial of their claims under the Sharing Agreement and the return of any monies distributed to date. Simply stated, the objecting parties cannot claim to be parties to the proposed settlements for one purpose and not parties for another." *Ibid.*

We see no coercion or impropriety in this language. It would certainly not have been fair to permit Subclass IV, which to date has received over $11,000,000 in cash, much more than received by other members of the plaintiff class, to retain this money while also rejecting the present settlements. As indicated above, the Sharing Agreement and the present settlement agreements cannot be viewed as isolated from each other. They are chapters in a continuing story, all of the parts of which are interdependent. When Subclass IV accepted substantial cash payments under the Sharing Agreement, it knew that further settlement negotiations would be taking place against certain defendants, and that the results of these negotiations would be submitted to the District Court for approval. The requirement of court approval protected it against unfair imposition, and, as a last resort, the Subclass also retains the right to go to trial against the settling defendants, provided always that it may not take the benefit of this course of settlement negotiations without also assuming the burdens which other members of the plaintiff class have assumed.

In short, we find no error of law, abuse of discretion, or clearly erroneous finding of fact in the actions of the Dis-

trict Court. The orders of that court approving the various settlement agreements in question on this appeal are therefore

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 85-5425 & 86-5012-MN

In Re Flight Transportation Corporation
Securities Litigation

Subclasses I, II, III (Shareholders), et al.,

Appellees.

v.

Subclass IV (Unitholders),

Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Appellant's petition (Subclass IV — United Holders) for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

July 31, 1986

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

In Re FLIGHT TRANSPORTATION CORPORATION SECURITIES LITIGATION

Pretrial Order No. 250
MASTER DOCKET NO. 4-82-874
MDL NO. 517

MEMORANDUM OPINION

WEINER, J.[1] OCTOBER 17, 1985

The Flight Transportation Corporation ("FTC") Securities Litigation, MDL 517, was, at one time, comprised of over 54 lawsuits, including actions brought against the company's officers and directors, its outside counsel, its auditors, its major lenders, its insurers, the underwriters for each of the company's four public offerings, and counsel to the underwriters for three of the public offerings. While plaintiffs and defendants may disagree with respect to the identity of the parties bearing responsibility for the FTC debacle, there can be no doubt that numerous innocent victims were the subject of a fraud of major proportions.

Presently pending before the court are proposed settlement agreements between the plaintiffs and the following parties: (1) Laidlaw Adams & Peck, Inc. (principal underwriter of the March 2, 1981 FTC public offering); (2) Alexander & Alexander, Inc. and Alexander and Alexander

[1]Judge Weiner, a district judge in the Eastern District of Pennsylvania, is sitting by designation.

Services, Inc. (FTC's aircraft insurance carrier), Evanston Insurance Company (FTC's directors and officers insurance carrier), FTC's outside directors, Ezell Jones, Wardwell M. Montgomery, Russell T. Lund, Jr., Larry Walston, Delbert Oldenburg, and Marjorie Terhaar and Jack Adams, Jr.; (3) Opperman & Paquin, a partnership, McGovern, Opperman and Paquin, a partnership, James E. Schatz and Joseph R. Kernan (FTC's outside counsel), James F. McGovern and American Home Assurance Company (Opperman & Paquin's insurance carrier); (4) Norwest Bank of Minneapolis, N.A. and Norwest Bank Calhoun Isles, N.A. (FTC's primary lenders) and St. Paul Fire & Marine Insurance Company; (5) Fox & Co., John E. Harrington, Norman E. Klein, Mark Mersman and all present and former partners, employees, and agents of Fox & Co. (FTC's auditor for the fiscal years ending June 30, 1979, June 30, 1980, and June 30, 1981); and, (6) Reavis & McGrath (counsel to certain underwriters for the March, 1981 and June, 1982 FTC public offerings.) Approval of the proposed settlements would effectively bring this most complex litigation to a close, leaving only matters such as fee applications and claims administration.[2]

On September 13, 1985, the court held a hearing to afford interested parties an opportunity to voice objections

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[2]The court has previously given its approval to two other settlements. The first agreement was reached with William Rubin, former Chairman of the Board and Chief Executive Officer of FTC, and his estranged wife, Joyce.

The second agreement was reached with Drexel Burnham Lambert Incorporated and Mosely, Hallgarten, Estabrook & Weeden, Inc., principle underwriters of the FTC June 3, 1982 public offering and sole underwriters of the FTC June 4, 1982 public offering. This settlement has been appealed to the United States Court of Appeals for the Eighth Circuit by a member of plaintiff subclass V, Selected Special Shares, Inc. Oral argument has been deferred pending a possible resolution of the matter.

to the proposed settlements. Four parties filed objections to the settlements and were heard by the court. Two included participating creditors, Federal Deposit Insurance Corporation, as successor in interest to Continental Bank & Trust Company of Chicago, and Greyhound Leasing and Financial Corporation. The other two objectors include counsel for subclass IV and the same member of subclass V who objected to the Drexel settlement, Selected Special.[3] A member of the Plaintiffs Steering Committee was heard in support of the proposed settlements.

The recoveries generated from the proposed settlements, together with money already in the hands of the receiver, would bring the total amount of money available for distribution to over $52 million. In addition to the monetary aspect of the proposed settlements, other salient features that are common to each of them can be summarized as follows:

1. The plaintiffs agree to dismiss the defendants from the litigation and release them from all claims which were or could have been asserted against them.

2. The plaintiffs agree to provide the defendants with

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[3]The reference to "participating creditors" and various "subclasses" is derived from the Sharing Agreement, a document which, *inter alia*, provides for the distribution of monies among the creditors and securities holders of FTC. *See generally In Re Flight Transportation Corporation Securities Litigation*, 730 F.2d 1128 (8th Cir. 1984) (affirming this court's approval of the Sharing Agreement), *cert. denied*, 105 S.Ct. 1169 (1985). Under the Sharing Agreement, recoveries were divided into two funds. Fund A is comprised of an escrow fund (created when the proceeds of FTC's last public offering were impounded pursuant to a temporary restraining order) and assets of FTC. Fund B is comprised of all other recoveries. Participating creditors refer to those creditors who can participate in, i.e. receive distribution from, Fund B. Excluded from participating creditors are defendants in this litigation.

The Sharing Agreement also divided the securities holders into five subclasses. Membership in a subclass is keyed to the particular public offering from which the holder purchased the securities. The Sharing Agreement sets forth a schedule for the allocation of monies among the various subclasses.

a legal defense to all claims which may be asserted against the defendants arising out of matters which formed the basis of this litigation.

3. The plaintiffs agree to indemnify and hold harmless the defendants for any judgments that may be obtained against the defendants arising out of matters which formed the basis of this litigation. (This provision is not a part of the Laidlaw settlement.)

4. The defendants agree to assign to the plaintiffs all claims, cross-claims, etc. held by the defendants arising out of matters which formed the basis of this litigation.

The principal concern of three of the objectors, counsel for subclass IV and the two participating creditors, lies with those portions of the proposed settlements which require the plaintiffs to defend and indemnify the defendants. They contend that these provisions place an unacceptable risk of personal liability being imposed on the plaintiffs. They point out that since several of the principals of FTC have taken the Fifth Amendment, all of the facts surrounding this litigation are not yet known. They assert that facts may emerge from the forthcoming criminal trial of the FTC principals which may cause additional actions to be filed against the defendants. The three objectors find his situation particularly troublesome in light of the fact that the six year Minnesota statute of limitations will not be tolled for almost another three years.

Selected Special objects to the proposed settlements on the grounds that "such settlements are not fair, reasonable and adequate with respect to the interests of Selected . . . particularly to the extent such settlements . . . are inconsistent with or contrary to the terms and scheme of allocation and distribution set forth in the Sharing Agreement."

[Selected Special's Objection to Proposed Settlement at 1-2]. The heart of Selected Special's objection concerns uncertainty over how much money it will receive after claims of higher priority are paid.

There are a number of factors a court should consider in evaluating a proposed settlement. These include: (1) the complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining a class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *City of Detroit v. Grinnel Corporation,* 495 F.2d 448, 463 (2d Cir. 1974).

The settlements presently before the court were reached as a result of arduous and lengthy negotiations. The recoveries generated by this process have contributed to establishing a fund, which, by conservative estimates, will allow many of the injured parties to recoup up to 90% of their losses. The plaintiff's damage estimates for this case ranged between 50 and 55 million dollars. Thus, the settlement fund, which, as previously stated, totals in excess of $52 million, falls well within the plaintiffs' best estimates of the value of the case.

On the other hand, plaintiffs' claims of liability against each of the settling defendants are not equally strong. Plaintiffs' Section 11 and 12(2) claims against certain defendants assert secondary or control person liability. Plaintiffs' Section 10(b) claims require a showing of scienter. Such claims

may involve difficult proof problems or present novel issues of law which will form the basis of an appeal.[4] In view of the risks associated with proceeding to trial, particularly when measured against the almost unprecedented rate of recovery for this kind of litigation, approval of the proposed settlements is strongly indicated.

The objections raised to the proposed settlements do not persuade this court otherwise. The court recognizes the concern that counsel for subclass IV and the two participating creditors have for the provisions of the settlements which require the plaintiffs to defend and indemnify the defendants for all claims related to matters which formed the basis of the FTC litigation. But while one can conceivably spin out scenarios which would require these provisions to be invoked (the objectors have not done so), the probability of such scenarios reaching fruition is remote. This litigation has been in progress for well over three years and has been the subject of much public attention. Thus, there is little likelihood that new claims will be asserted. More importantly, however, the proposed settlements, as previously mentioned, call for the defendants to assign to the plaintiffs all claims, cross-claims, etc. that are asserted or may be asserted by the defendants. The claims that will be assigned to the plaintiffs represent a significant portion of the universe of all claims which could be brought against the defendants. This provides real and substantial protec-

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[4]For example, the scienter requirement — that the defendants had actual knowledge of or recklessly ignored material facts which should have been disclosed — presents a difficult proof problem because many of the defendants claim that they relied on other defendants. The control person liability claims could form the basis of a legal issue on appeal because certain defendants have insisted that in order to maintain such a claim, a showing of "culpable participation" is required. *See e.g., Antinore v. Alexander & Alexander Services, Inc.*, 597 F.Supp. 1353, 1360 (D. Minn. 1984). The Eighth Circuit has not had the opportunity to squarely address this issue.

tion to the plaintiff class members against the possibility of the indemnification provisions being invoked.

The participating creditor and subclass IV objectors have also taken the position that since they are not signatories to the proposed settlement agreements, the court cannot "impose" the terms of the settlements on them without their consent. The objectors urge a change in the indemnity provisions of the settlements to language similar to a judgment reduction provision contained in the Drexel settlement. That failing, they desire the case to proceed to trial.

The court takes this opporunity to inform the objecting parties that they may proceed to trial on their claims and that such trial will be held in January, 1986. However, the parties cannot both proceed to trial and reap the benefits that are derived from the settlements. Any trial of this matter will be conditional upon the renunciation by the parties desiring a trial of their claims under the Sharing Agreement and the return of any monies distributed to date. Simply stated, the objecting parties cannot claim to be parties to the proposed settlements for one purpose and not parties for another.

The court also finds the objection of Selected Special to be without merit. Its concern over the percentage payout of its claim is grounded in the low priority its claims are given under the Sharing Agreement. Thus, its objection is the product of the Sharing Agreement and not the result of any unfairness in the settlements presently before the court.

The court finds the proposed settlements fair, adequate, and reasonable. Appropriate orders approving the settlements accompany this Memorandum Opinion.

/s/ CHARLES R. WEINER
Charles R. Weiner

Filed Oct. 25, 1985
Francis E. Dosal, Clerk
By S. W.
Deputy

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

In Re FLIGHT TRANSPORTATION CORPORATION SECURITIES LITIGATION

Master Docket No. 4-82-874
MDL No. 517

PRETRIAL ORDER NO. 250

WEINER, J. OCTOBER 17, 1985

The parties desiring to proceed to trial of this matter shall notify the court within ten (10) days of the filing of this order. No distribution of any monies shall be made to any of the pa ties until such time as the trial of these issues has been completed.

IT IS SO ORDERED.

/s/ CHARLES R. WEINER
Charles R. Weiner

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
FOURTH DIVISION

IN RE FLIGHT TRANSPORTATION
CORPORATION SECURITIES LITIGATION

Master Docket No. 4-82-874
M.D.L. 517

PRETRIAL ORDER NO. 253

ORDER AND JUDGMENT APPROVING THE SETTLEMENT WITH FOX & COMPANY, JOHN E. HARRINGTON, NORMAN E. KLEIN, AND MARK MERSMAN PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 23 AND 54(b)

The terms used herein shall have the same meanings as set forth in the Settlement Agreement Between Certain Claimants and Fox & Company, John E. Harrington, Norman E. Klein, and Mark Mersman (individually as representatives of the Defendant Settlement Class defined therein) (hereinafter "Fox Settlement"). Pursuant to Pretrial Order No. 237, notice of the Fox Settlement was sent to all members of the Plaintiff Settlement Class. On 7/31, 1985, a summary notice regarding the Fox Settlement was published in *The Wall Street Journal*, national edition.

The Fox Settlement, executed by the Settling Claimants and Fox, was filed with the Court on 7/10, 1985, and preliminarily approved by the Court on 7/11, 1985.

Upon thorough consideration of the Fox Settlement, all affidavits, memoranda, and other documents submitted in support thereof, and in opposition thereto, and after consideration of all objections to the Fox Settlement, the Court

finds that the Fox Settlement is fair, adequate and reasonable.

THEREFORE, IT IS ORDERED that:

(1) The Consolidated Action and all Other Actions by Settling Claimants and the Plaintiff Settlement Class against Fox are dismissed with prejudice on the merits and without costs as to Fox;

(2) Fox is discharged from any and all claims, demands and causes of action which have been or could have been asserted against it by the Settling Claimants and Plaintiff Settlement Class, arising out of or relating to the Consolidated Action or Multi-District Litigation;

(3) Settling Claimants and the Plaintiff Settlement Class are permanently barred and enjoined from asserting against Fox any claim, demand, right or cause of action arising out of or relating to the Consolidated Action or Multi-District Litigation;

(4) This Court retains jurisdiction over these settlements and their effectuation;

(5) The Receiver is authorized to enter into the Fox Settlement and effectuate the terms thereof; and

(6) The Court finds that there is no just reason for delay and directs that judgment be entered pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

Dated: 10/17/85

Filed Oct. 25, 1985
Francis E. Dosal, Clerk
By S. W.
Deputy

ENTER:
/s/ CHARLES R. WEINER
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

IN RE FLIGHT TRANSPORTATION
CORPORATION SECURITIES LITIGATION
FRANK P. ANTINORE, ET AL.,

vs.

REAVIS & McGRATH, A Partnership.
Master Docket No. 4-32-874
Civil Action No. 4-83-435

Judge Charles R. Weiner

FINAL ORDER

PRETRIAL NO. 254

This case came on for hearing on plaintiffs' complaint and on the motion of plaintiffs and defendant Reavis & McGrath for approval of a Settlement Agreement, and notice having been duly given to all members of the class as described herein, and all interested parties having been afforded an opportunity to be heard, and the Court, being fully advised in the premises, finds as follows:

A. All of the following described persons, except those who have submitted written requests for exclusion, are members of the class pursuant to Rule 23 of the Federal Rules of Civil Procedure and are bound in all respects by this Judgment:

> All persons who purchased FTC securities during the period from November 30, 1979, to June 18, 1982, and suffered a loss from such purchase. Excluded

from the Settlement Class are Reavis & McGrath and all defendants in any related action; all members of the immediate families of any individuals excluded from the Settlement Class herein; all partners, officers, and/or directors of Reavis & McGrath or of any other entities excluded from the Settlement Class herein; all entities in which Reavis & McGrath or any other individual or entity excluded from the Settlement Class herein has a controlling interest; all persons who purchased or otherwise own any FTC securities on behalf of Reavis & McGrath or any other individual or entity excluded from the Settlement Class herein; and all other individuals or entities found culpable of wrongdoing in any related action.

B. The named plaintiffs in this case, who have been designated as representatives of the class described herein, and the Class Counsel have fairly and adequately represented the interests of the class described herein and the class and subclasses which were certified in the Consolidated Action (case no. 4-82-874).

C. Proper notice has been given in accordance with Rule 23 of the Federal Rules of Civil Procedure.

D. The terms and conditions of the Settlement Agreement Between Certain Claimants and Reavis & McGrath are fair, reasonable and adequate to the Settling Claimants as defined therein and all such terms and conditions are lawful, binding and enforceable with respect to all Settling Claimants and Reavis & McGrath. A copy of the Settlement Agreement is attached hereto and incorporated herein.

ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The Court approves the proposed settlement of this case pursuant to the Settlement Agreement as fair, reasonable and adequate.

2. The case of *Frank P. Antinore, et al. v. Reavis & McGrath,* case no. 4-83-435 in the United States District Court for the District of Minnesota, Fourth Division (hereinafter "Reavis action") is dismissed with prejudice and without costs and on the merits as to all members of the class described herein, except those who have submitted written requests for exclusion.

3. Each class member as to whom the Reavis action is dismissed with prejudice and each Settling Claimant as defined in the Settlement Agreement are barred and permanently enjoined from initiating, filing, prosecuting or pursuing any actions against Reavis & McGrath, its past, present and future partners, associates, employees and agents which such member and Settling Claimant ever had, now have, or hereafter may have, whether directly, by assignment or otherwise, which were asserted in, or which arose or might arise out of or in connection with any fact or matter alleged or referred to in the complaints in the Reavis action and the Consolidated action and any other action arising out of or relating to Flight Transportation Corporation, against any person, regardless of whether such claims have heretofore been specifically pleaded. This injunction includes, without limitation, all such individual and class claims; all such allegations of conduct, omissions or damages occurring in whole or in part between November 30, 1979 and June 18, 1982; all such claims arising

under the laws of any jurisdiction, including without limitation all federal and state securities laws, statutory law and common law and all claims heretofore or hereafter assigned to the Settling Claimants by or on behalf of Drexel Burnham Lambert Incorporated, Moseley, Hallgarten, Estabrook & Weeden, Inc., Merchants Investment Counseling, Inc., Merchants National Bank and Trust Company of Indianapolis, Keystone Custodian Funds, Inc., Federal Insurance Company and by or on behalf of any other person or entity. Each such class member and Settling Claimant is adjudged to have settled all such claims against Reavis & McGrath as fully and completely as though that class member and Settling Claimant had executed and delivered to Reavis & McGrath general releases.

4. Any person or entity that has duly requested exclusion from the class may hereafter pursue only his own individual claims, if any, and not any class actions based upon his individual claims.

5. This Court retains jurisdiction to enforce and administer all terms and provisions of the Settlement Agreement and any matters which may arise therefrom.

6. In the event that this Final Order is not otherwise final and appealable, the Court finds that there is no just reason for delay and directs that judgment be entered pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

Date: 10/17, 1985

Filed Oct. 25, 1985
Francis E. Dosal, Clerk
By S. W., Deputy

ENTER:
/s/ CHARLES R. WEINER
District Judge

APPENDIX G

The pertinent provision of the Fifth Amendment to the United States Constitution states: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

The pertinent provisions of Rule 23 of the Federal Rules of Civil Procedure states:

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in

an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and who the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the presentation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

APPENDIX H

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

IN RE: FLIGHT TRANSPORTATION
CORPORATION SECURITIES LITIGATION
MASTER DOCKET NO. 4-82-874
M.D.L. No. 517

Honorable Charles R. Weiner

IMPORTANT

NOTICE OF CLASS ACTION DETERMINATION AND HEARING TO APPROVE PROPOSED PARTIAL SETTLEMENTS

This is an official court notice to inform you about a class action lawsuit in which you are apparently a class member so that you may decide: (1) whether to remain as a class member or exclude yourself and, (2) if you elect to stay a class member, what you wish to do with respect to the proposed partial settlement of this action described below.

Notice to Brokers and Other Nominees: If you purchased Flight Transportation Corporation ("FTC") securities during the period November 30, 1979, to June 18, 1982, for another person, now hold such securities for another or are acting as administrator or executor for one who owned FTC securities, you are required to inform the beneficial owners of such securities or any heirs or other persons who might assert a claim for losses sustained on such securities, of the

pendency and partial settlement of this class action. You may obtain additional copies of this Notice from Karl L. Cambronne, Chestnut & Brooks, P.A., 900 Norwest Midland Bldg., Minneapolis, MN 55401. Plaintiffs will not be required to pay any bank, brokerage house, or other nominee any money for expenses incurred in the transmittal of this Notice to beneficial owners, owners, heirs, or other persons.

DESCRIPTION OF THIS LAWSUIT

1. *Background*

In June of 1982, the United States Securities and Exchange Commission ("SEC") filed a lawsuit in the United States District Court, District of Minnesota, against FTC and its president, William Rubin, alleging violations of federal securities laws. The SEC sought an injunction against further violations and disgorgement of unlawfully obtained funds.

The consolidated class action lawsuit which is the subject of this Notice is the result of many individual complaints filed in or shortly after June of 1982 by people who held securities or were creditors of FTC. Most of the individual lawsuits have been consolidated for coordinated pretrial proceedings before the Honorable Charles R. Weiner, United States District Judge, Eastern District of Pennsylvania, sitting by designation in the United States District Court, District of Minnesota.

2. *Plaintiffs' Claims*

The Consolidated Complaint filed herein combines the allegations made by FTC security holders in their individual complaints. A separate class action Complaint has been filed

by certain mutual funds who also invested in FTC. These two Complaints allege that between November 30, 1979, and June 18, 1982, FTC and other defendants, including its auditors, underwriters, officers, attorneys, and directors, engaged in an ongoing plan and scheme to defraud the investing public by means which included materially false statements in public documents and material omissions of fact from public documents, including Annual Reports and Registration Statements filed with the SEC. Plaintiffs allege that FTC and other defendants violated, among other statutes, section 11 of the Securities Act of 1933 and section 10(b) of the Securities Exchange Act of 1934, and that they committed common law fraud and breached contracts with plaintiffs. The plaintiffs seek to recover on their own behalf, and on behalf of a Class of all similarly situated persons, damages for losses resulting from the alleged illegal conduct.

3. *Defendants' Responses*

Except for FTC, the defendants have denied the material allegations of the Complaints. Several defendants have also counterclaimed against FTC and its co-defendants, claiming that such counterdefendants are principally responsible for any illegal activities and should bear principal responsibility for any damages resulting therefrom.

4. *The Bankruptcy and Constructive Trust Issue*

At the SEC's request, the Court appointed a Receiver for FTC. He holds all of FTC's assets and approximately $24 million received by FTC in June of 1982 following two public securities offerings by FTC (the "Escrow Account"). The Receiver is liquidating FTC's assets.

On June 29, 1982, certain creditors of FTC filed an involuntary bankruptcy petition against FTC and seek to use FTC's assets to satisfy their claims. Certain FTC security holders opposed bankruptcy jurisdiction over the Escrow Account and maintained that the Escrow Account should be used by the District Court to satisfy their claims. Subclasses III and IV, described below, sought a constructive trust on the Escrow Account and requested the immediate return of such funds. The constructive trust was opposed by certain creditors and the Receiver.

THE COURT EXPRESSES NO OPINION ON THE MERITS OF ANY OF THE CLAIMS OR DEFENSES IN THIS LAWSUIT

PART ONE: NOTICE OF PENDENCY OF CLASS ACTION

DESCRIPTION OF THE PRELIMINARY PLAINTIFF CLASS AND SUBCLASSES

All FTC security holders are allied in their goal of establishing violations of securities and other laws by FTC and other defendants. However, all may not have identical interests in these proceedings. Accordingly, the Court has preliminarily determined that the Complaints may be maintained as class actions for purposes of the partial settlement described herein, with the following Class and Subclasses, which accommodate potentially competing interests of Subclasses of FTC security holders.

CLASS. All persons who purchased FTC securities during the period from November 30, 1979, to June 18, 1982, and suffered a loss from such purchase, excluding all defendants named in the consolidated action or any related actions;

all members of the immediate families of any individuals named as defendants therein, or of any other individuals excluded from the class defined therein; all partners, officers, and/or directors of any entities named as defendants therein, or of any other entities excluded from the class defined therein; all entities in which any defendant, or any other individual or entity excluded from the class defined therein, has a controlling interest; all persons who purchased or otherwise own any FTC securities on behalf of any defendant therein, or any other individual or entity excluded from the class defined therein; and all other individuals or entities found culpable of wrongdoing in the consolidated action or any related action.

Subclass

SUBCLASS I

Definition

All Class Members who purchased, directly or in the aftermarket, common stock of FTC issued pursuant to a Registration Statement declared effective by the SEC on or about November 30, 1979.

Representative(s) Counsel

Allan Ziskin — John A. Cochrane, Cochrane & Bresnahan, 360 Wabasha St., Suite 500, St. Paul, MN 55102; Daniel W. Krasner, Wolf Haldenstein, Adler Freeman & Herz, 270 Madison Avenue, New York, NY 10016.

SUBCLASS II

All Class Members who purchased, directly or in the aftermarket, common stock and/or warrants to pur-

chase common stock of FTC offered as units of securities of FTC, each unit consisting of one share of common stock of FTC and one half of a warrant to purchase one share of common stock of FTC, issued pursuant to a Registration Statement declared effective by the SEC on or about March 2, 1981.

Stanley Koutek — John A. Cochrane.

Dennis Barr — Daniel W. Krasner.

SUBCLASS III

All Class Members who purchased, directly or in the aftermarket, common stock in FTC issued pursuant to a Registration Statement declared effective by the SEC on June 3, 1982.

Denis A. Koltun, Bruce Shankman, R. I. Schwarzschild, Dolores and Robert Bezark — Lowell E. Sachnoff, Sachnoff, Weaver & Rubenstein, Ltd., One IBM Plaza, Chicago, IL 60611; Jack L. Chestnut, Chestnut & Brooks, P.A., 900 Norwest Midland Bldg., Minneapolis, MN 55401.

SUBCLASS IV

All Class Members who purchased, directly or in the aftermarket, debentures and/or warrants to purchase common stock of FTC offered as units of securities of FTC, each unit consisting of a $1,000 principal amount 11¼% Sinking Fund Debenture due June 1, 1995, and warrants to purchase 57 shares of FTC common stock, issued pursuant to a Registration Statement declared effective by the SEC on June 4, 1982.

Putnam High Yield Trust, United High Income Fund, Inc., Oppenheimer High Yield Fund — James C. Diracles, Best & Flanagan, 4040 IDS Center, Minneapolis, MN 55402.

SUBCLASS V

All Class Members who are not included in any of Subclass I, II, III, or IV, defined above.

Ronald Knuth, Emil Gotshlich — John A. Cochrane, Daniel W. Krasner, Thomas P. Gallagher, 1500 Midwest Plaza West, Minneapolis, MN 55402.

1. *What is a Class Action*

A class action is a lawsuit in which one or more named plaintiffs bring suit on behalf of themselves and all other persons who are similarly situated. The result reached in the lawsuit, whether favorable or not, is binding on all members of the class who do not exclude themselves. If the plaintiffs are successful, all qualifying class members who have not excluded themselves will share in any money recovered. If a class member excludes himself and the lawsuit is successful, then he will not share in any money recovered by the plaintiffs. If a class member excludes himself and the lawsuit is not successful, he will not be bound by such result.

2. *How to Stay in this Class Action*

If you desire to remain as a member of the Class in this lawsuit, you do not have to do anything. If you remain a member of the Class, you will be represented by the Plaintiffs' Steering Committee, comprised of the lawyers set forth above.

Remaining as a class member will not subject you to any out-of-pocket costs or fees *and* will enable you to participate

in the recoveries obtained pursuant to the Sharing Agreement, as described in PART TWO, below. You may enter an appearance in this action through your own attorney, but at your own expense.

3. *How To Be Excluded From the Class*

Any member of the Class may be excluded, but only upon specific request. If you wish to be excluded from the Class, you must submit a written request for exclusion, postmarked no later than July 12, 1983, to: Clerk of the Court, United States District Court, District Court of Minnesota, P.O. Box 9837, Minneapolis, MN 55440. If you submit a request for exclusion, it must include your name and address and state that you request exclusion. To be excluded from the Class you must file a request for exclusion even if you have filed a lawsuit based on an FTC-related claim. The request for exclusion need not state the reason you desire to be excluded. Both the request for exclusion and the envelope containing it should clearly indicate: "In re: Flight Transportation Corporation Securities Litigation; Master Docket No. 4-82-874."

THE COURT CANNOT ADVISE YOU AS TO WHETHER YOU SHOULD EXCLUDE YOURSELF FROM THE CLASS.

4. *Keep Your Address Current*

If you remain as a member of the Class, you are requested to notify the Clerk of the Court (see paragraph 3, above) of any changes in your address.

5. *Court Files Available*

The Court files in this lawsuit are available for inspection during regular office hours at the Office of the Clerk of the Court, United States District Court, District of Minnesota, 110 South Fourth Street, Minneapolis, MN.

PART TWO: NOTICE OF HEARING AND SUMMARY OF PROPOSED PARTIAL SETTLEMENTS

Partial settlements of this lawsuit have been proposed to the Court. The Court must approve the partial settlements before they become effective. The proposed partial settlements have two basic parts: (1) The Sharing Agreement, and (2) the Settlement Agreements with William Rubin and Joyce Rubin.

1. *The Sharing Agreement*

As set forth above, creditors of FTC, persons who purchased common stock directly from FTC, persons who purchased common stock in the open market, and holders of FTC debentures each may have different legal claims against FTC and other defendants. Some claims may be mutually exclusive or conflicting. The principal conflict is between persons who acquired FTC securities in June, 1982, pursuant to FTC's public offerings on June 3 and 4, 1982, and who seek a constructive trust, and creditors of FTC, parties such as a trustee in bankruptcy or Receiver whose responsibility is the conservation of FTC's assets (hereinafter referred to as a "Trustee") and persons who acquired FTC stock in some other manner, who oppose the constructive trust. To avoid the cost, delay, and uncertainty of litigation of such competing claims, certain major creditors of FTC,

counsel for each Subclass, and the Receiver have entered into the Sharing Agreement, which is expected to be entered into by any Trustee who may later be appointed. Its principal features may be summarized as follows:

(a) Under the Sharing Agreement, participating creditors, FTC security holders, and the Trustee will not further litigate competing claims and will cooperate in jointly prosecuting all of their claims against defendants through a Claimants' Committee comprised of representatives from each Subclass, Receiver, and participating creditors of FTC;

(b) All money recovered from defendants, the Escrow Account, and the liquidation of FTC's assets will be deposited into a central fund;

(c) Under supervision of the Claimants' Committee and the Court, creditors and members of the Class will be allocated amounts from the central fund to be applied in payment of their claims against FTC and other defendants. Allocation of money recovered from defendants, including funds transferred by the Court from the Escrow Account and the assets of FTC, will be as follows:

(1) The initial $25,000,000:

CREDITORS	$11,000,000
SUBCLASSES I and II	500,000
SUBCLASS III	1,250,000
SUBCLASS IV	11,000,000
SUBCLASS V	500,000
EXPENSE FUND	750,000

(2) The next $5,000,000:

CREDITORS	$1,500,000
SUBCLASSES I and II	500,000
SUBCLASS III	1,000,000
SUBCLASS IV	1,500,000
SUBCLASS V	500,000

(3) The next $5,000,000:

CREDITORS	$1,800,000
SUBCLASSES I and II	—0—
SUBCLASS III	500,000
SUBCLASS IV	2,700,000
SUBCLASS V	—0—
	$35,000,000

(4) Any money recovered in excess of $35 million will be allocated to participating creditors and Subclasses III and IV until they have received 95% of their out-of-pocket damages approved by the Court. At that time, additional recoveries will be allocated to Subclasses I, II, and V, until they, too, have received 95% of such damages. After all groups of Claimants have received 95% of such damages, all groups will share in additional recoveries until each group receives 100% of its out-of-pocket damages. Recoveries exceeding 100% of claimants' out-of-pocket damages,

if any, will be applied as appropriate to Court-approved expenses, interest, and attorneys' fees and further distributions distributed to claimants;

(5) The $750,000 Expense Fund set forth in subparagraph (c)(1), above, will be used to pay out-of-pocket court costs and expenses incurred in prosecuting this action;

(6) After $40 million has been recovered, an amount to be approved by the Court may be reserved to pay Court-approved attorneys' fees and costs.

NOTE: Under the Sharing Agreement, Class Members will recover money according to the schedules above, and are:

(a) Compromising their constructive trust claim against the Escrow Account;

(b) Giving up their right to file claims in Bankruptcy Court as holders of FTC securities;

(c) Agreeing to turn over any separate recoveries they might obtain to be shared with the other claimants; and

(d) Assigning all of their claims against other defendants for common prosecution by the Claimants' Committee.

2. *The Proposed Settlement Agreements With William Rubin and Joyce Rubin*

The second principal element of the proposed partial settlement are the Agreements of Settlement Between Claimants and Settling Defendants — Number One — William Rubin, and — Number Two — Joyce Rubin ("Settlement Agreements"). Pursuant to the settlement with William Rubin the following will occur: (a) he will turn over to the

Receiver all of his assets, excluding certain items of personal property, but including all of his interest in FTC and its subsidiaries; (b) his lawyer will be allowed to petition the Court for up to $250,000 for fees and expenses incurred in representing him in this action and possible future criminal proceedings; (c) he will provide certain assistance to the Claimants' Committee in prosecuting further actions against other defendants; and (d) he will be released from certain claims against him brought by parties to the Sharing Agreement.

The proposed settlement with Joyce Rubin, William Rubin's wife, is as follows: Joyce Rubin has filed a divorce complaint in the Minnesota state courts seeking one-half of William Rubin's assets. Under the proposed settlement with her, Joyce Rubin and all other members of her family: (a) will release or waive all claims against FTC and the assets of William Rubin that will be turned over to the Receiver in connection with William Rubin's settlement as set forth above; (b) will assign to the Claimants' Committee all of their claims against William Rubin and cease to assert any further claims in this litigation against William Rubin, FTC, or anyone else; (c) will cooperate with the Claimants' Committee in the prosecution of this litigation against the other defendants; (d) will receive assets valued at approximately $607,000 subject to certain liens; and (e) certain of Joyce Rubin's attorney's fees will be paid and she will receive child support payments, with total payments amounting to approximately $55,000.

3. *Value of the Settlements*

Under the Sharing Agreement it is contemplated that appropriate orders will be sought from the Court directing the

Receiver to turn over to the Claimants' Committee the assets of FTC, valued at approximately $4,100,000, the Escrow Account, valued at approximately $24,100,000, and the proceeds of the above settlements with William and Joyce Rubin valued at approximately $1,200,000. As a result, it is anticipated that approximately $29,400,000 will be available shortly after the hearing described below for allocation under the Sharing Agreement.

NOTICE OF HEARING

A hearing will be held on June 27, 1983, at 11:30 a.m., in the United States Courthouse, 110 South Fourth Street, Minneapolis, MN 55401 for the purpose of determining whether the Sharing Agreement and Settlement Agreements should be approved by the Court as fair, reasonable, and adequate and seeking the transfer of money to the central fund for allocation under the Sharing Agreement as described above.

At the hearing, any Class Member who has not excluded himself from the Class, as set forth above, may appear, through counsel if he chooses, and show cause why the Sharing Agreement and Settlement Agreements should not be approved; provided, however, no person may appear and object unless he has first filed with the Clerk of the Court, United States District Court, District of Minnesota, Fourth Division, 110 South Fourth Street, Minneapolis, MN 55401, a written notice of his intention to appear and object and stating the full legal and factual basis for such objection. Such written notice must be received by the Clerk of the Court on or before June 15, 1983, and accompanied by sworn proof of service stating that such written notice and all supporting papers were served by first class mail, postage prepaid, upon:

Plaintiffs' Steering Committee, 900 Norwest Midland Bldg., Minneapolis, MN 55401.

ADDITIONAL INFORMATION

Any questions you may have concerning the matters contained in this Notice should be directed in writing to Clerk of the Court, United States District Court, District of Minnesota, P.O. Box 9837, Minneapolis, MN 55440.

DATED: May 31, 1983.

Robert E. Hess
Clerk of the Court
United States District Court
District of Minnesota